RESOLVING LOCAL LAND-USE DISPUTES: A COLLABORATIVE APPROACH

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Protracted, often hostile, legal disputes between industry officials, government representatives and environmental protection advocates characterized many federal regulatory efforts in the 1970s. The high financial costs and otherwise unsatisfactory results of litigation—around such issues as siting energy facilities and regulating mineral exploration in wilderness areas—have motivated government, environmental and industry groups to explore alternative approaches for resolving their differences.[1] For example:

- In 1982, the *New Hampshire Public Utilities Commission* negotiated an agreement with a major power company, two state agencies and Maine's Department of Environmental Protection for converting three power company generators from oil to coal fueling. The agreement resolved a long-standing controversy over coal conversion by providing for: (1) voluntary company compliance with Maine's stricter emission standards (2) financial safeguards for the consumers and the company and (3) incentives for rapid and efficient conversion. The *negotiations were mediated* by the *New England Environmental Mediation Center* (Boston).[2]
- *The Institute for Environmental Negotiation* (Charlottesville, Virginia) was contacted by a local neighborhood leader to *facilitate* several issue identification sessions and to *mediate* negotiations between neighborhood residents and a local moving-van line company. The company's trucks were exacerbating traffic and parking problems along neighborhood streets. By the end of the third session, company and neighborhood representatives reached agreement on several solutions to alleviate the problems, including a joint initiative to alter county policy regarding the commercial use of certain local streets.[3]
- *The Agricultural Chemicals Dialogue Group*, composed of leaders from U.S. chemical companies and church and environmental organizations, agreed last year on new guidelines for industry advertising practices to reduce the misuse of agricultural chemicals exported to developing countries. The dialogue group's discussions were *facilitated* by staff members from the *Conservation Foundation* (Washington, D.C.)[4].

Successful application of collaborative planning and conflict management techniques—meeting facilitation, conciliation and mediated negotiation, etc.[5]—in environmental controversies [6] suggest their expanded use in resolving local development disputes.

Drawing upon recent literature in environmental conflict management, this paper suggests ways to supplement local land-use decisions with voluntary, cooperative techniques for creatively utilizing conflict, generating community consensus[7] and yielding fair,

efficient and durable land-use decisions. The article begins with a brief discussion of how mandated public participation in environmental planning generates the expression of conflicting interests and positions. The main part of the article suggests alternative approaches to conflict resolution within the framework of the standard local land-use decision-making process. One alternative approach— mediation—is illustrated by a hypothetical case. The final section discusses obstacles to the use of alternative dispute management techniques and strategies for dealing with these obstacles.

A Planner's Dilemma: How to Include the Public Without Getting Entangled in Unnecessary Disputes

In the 1970s, federal and state laws (e.g. National Environmental Protection Act (NEPA), California Environmental Quality Act (CEQA)) aimed at protecting air and water quality, and preserving environmentally sensitive land and other resources, mandated increased public participation in regulatory decision-making. For example, the Environmental Impact Report or Study (EIR/EIS) process—which requires a developer to think through the consequences of his project on the natural and social environment—includes a period for written comment and oral testimony from the public.

Many localities have supplemented state and federal citizen participation requirements by creating additional public discussion forums, such as design review committees. Public interest in reviewing development proposals has also been stimulated by the increased use of flexible zoning techniques such as planned unit developments (PUD), contract or conditional zoning and development agreements.[8]

However, techniques for effectively managing public participation, including the conflict that it generates, have not been incorporated into the decision-making process as rapidly as the demand for involvement. Often, the purpose and timing of citizen participation is unclear or inappropriate.[9] Because most local agencies telescope citizen involvement into the final stages of the planning process, interested citizens often perceive their only options as *endorsing* or *opposing* the proposed action.

Relying on public hearings as the principal channel for citizen input, government officials often witness public comment sessions erupt into bitter confrontations between interest groups. The agency may then find itself in an adversarial position with specific interest groups. The EIR, intended as a vehicle for improving the quality of a proposal, may become the basis for litigation or the focus of tactical manuevers to stall the process until decisive political pressure can be brought to bear upon the decision-makers.

* * * *

In a Town So Far From Here . . .

. . . the President of the Planning Commission banged her gavel to quiet the overflowing and agitated crowd. She wondered how it would be possible for the commission to render an acceptable decision on this controversial proposal; a multi-million dollar retail/office complex covering forty acres of forested land. A commission decision the previous year reclassifying the land from an agricultural zone to a planned development district (PDD) generated a storm of protest.

"We'll win in court," she comforts herself, remembering that both the developer and a coalition of citizen groups threatened action on procedural grounds should the commission decision not go in either's favor.

"We've followed all the procedures," she thinks, "EIR, public comment period, hearings, everything. All we have to do is take action within the next sixty days and we'll have come in within the statutory limit . . . so . . . what do I think about this proposal? Staff says yes, but the Mayor is only lukewarm. The developer has been flexible but we don't have guarantees on several important mitigation measures . . . If the vote were held right now, it would go 4-3 in favor of the project as proposed. We would get 6-1 on the scaled down version suggested in the EIR . . . but neither the coalition or the developer like that approach."

Someone shouts, "Recall!" from the rear of the chambers, and breaks the Chairperson's concentration.

"We're appointed" the vice-chair mumbles as the Chairperson returns to her thoughts.

"How did we get into this mess," she wonders, ". . . more important, how do we get out of it . . .?" The chairperson of the City Planning Commission bangs her gavel again, checks the gallery clock (12:30 a.m.) and speaks:

"Having completed the Public Hearing on the Draft Environmental Impact Report, I will now adjourn the meeting, unless one of my colleagues has a pressing consideration. One month from tonight the commission will consider the adequacy of the final EIR."

The chairperson looks to her right and to her left; she sees four raised hands.

* * * *

Generating consensus, or even a majority opinion, has become increasingly difficult as the perspectives and aspirations of the urban and suburban communities diversify. As a result, what initially emerges as a single issue (e.g., the expansion of a hotel facility)and evokes a public expression of differing opinions about the merits of the proposal, begins to disrupt the balance of relationships in the community and encourages the emergence of previously suppressed issues. The hotel expansion issue is linked with the jobs for local

residents issue, the growth issue, the parking issue, the conflict of interest issue. People begin to take sides, to question the ethical and moral stand of the opponents they've identified, and to use the media, and other mass opinion-making strategies to expose the "badness" of the plan and its proponents. Finally a full-fledged battle breaks out between the forces of light and those of darkness (depending which side you are on), a conflict which no longer requires the force of the initial issue (hotel expansion) to sustain it.

Conflict over development proposals is usually stimulated by one or more of the following considerations: [10]

- The real or perceived impacts from construction or operation of the new facilities (noise, traffic, public service burdens, subsequent growth, etc.);
- A fear that property values will drop because of the proximity to an undesirable facility;
- A change in the community character or amenities when development results in growth and change;
- An inability to fully comprehend the extent of the costs, risks and benefits associated with the development;
- A lack of trust or confidence on the part of the developer in the decision-making process.

Identifying these considerations early on in the decision-making process might enable the public official to pre-empt a full-blown battle. However, with land-use disputes becoming more frequent and complex, public officials need to equip themselves with more effective tools for managing public involvement.

Conflict: A Problem and an Opportunity

Conflict is an antagonistic state of relations resulting from real, perceived or feared incompatibility of interest. Conflict over land-uses is created by people reacting to contending priorities for how the environment should be arranged, i.e., conflict of interests.

> Unfortunately, we tend to see conflict as an aberration, a blemish on our social psyche. On the contrary, conflict is the very basis for social change in democratic society . . .[11]

As an integral and inevitable consequence of human interaction, conflict provides us an opportunity to clarify and fulfill our personal and communal aspirations. Conflict situations motivate people to weigh the consequences of inaction, air their personal concerns, identify issues, generate useful information, and assert their influence and power. In some cases, it may even be appropriate to foment conflict in order to create the basis for a mutually satisfactory resolution to a suppressed conflict.[12] In other words, conflict can provide a very useful function in the decision making process.

Conflict loses its productive function when frustration and distrust become the principal characteristics of the relationship between disputing parties; when participants experience the

situation as out of control. In such a context, people are less likely to pursue the communication and understanding needed to achieve an *acceptable* solution.

What is *acceptable* to people is what *works*, in their opinion, to support their well-being (i.e.,their interests, priorities), that of their family, their community, or the well-being of those they represent.

In order to achieve acceptable solutions to complex and controversial issues, public officials must somehow sustain the utility of conflict (information, self-expression) while limiting its costs (time, money, ruptured relationships).

How To Productively Utilize Conflict in the Land-Use Decision-Making Process

Table 1[13] outlines (1) the steps of the standard local land-use decision process (2) the potential evolution of conflict during the decision-making process (3) potential issues and behaviors triggered at each stage of conflict, and (4) alternative approaches for effectively managing conflict at each stage.

Step One: Proposal Development
Stage of Conflict: Avoidance
Situation:

A developer defers discussing his proposal concept in public until after he has formally submitted it to the city or county review agency. Instead he:

- selects a development site
- obtains an option for purchase
- drafts a concept plan
- determines funding needs and obtains financing (often conditional upon the receipt of a use permit)
- selects a team of planners, architects and engineers
- gets permit application instructions from the local government agency

After his team has created a site plan, the developer:

- reviews the plan
- submits the plan, permit application and environmental assessment questionnaire to the local agency.

The developer is reluctant to disclose information about his plan, since disclosure might generate early community opposition to his plan, and reduce his chances for government approval. However, it is quite likely that opposition will emerge anyway to a large scale proposal or to one that requires amendments to the applicable zoning regulations. Avoidance of contact with the public, however well intended,often generates suspicion and mistrust.

Alternative Approach:

A developer might prevent unnecessary conflict by creating opportunities for identifying and addressing community concerns before formal proposal submission. Under the heading *early community consultation*,[14] there are several ways to initiate a

LAND-USE DECISION-MAKING PROCESS	plan, completes application including Environmental Assessment Questionnaire	plant to local agency; Agency staff reviews application for completeness; Agency staff recommends EIR; Agency develops scope of EIR, sends out RFP, selects EIR consultants with developer	Draft Environmental Impact Report (DEIR)	on project, DEIR Public hearings are held by agency Other interested government agencies review DEIR, comment	advises EIR consultants of items to be addressed in final EIR Consultants draft final EIR Final EIR made public	sion decision Appeal filed Appellate decision by higher political body (e.g. City Council)
CONFLICT STAGE	*AVOIDANCE*	*SPECULATION AND ALLEGATION*	*CONFRONTATION*	*ESCALATION*	*IMPASSE*	*RESOLUTION*
POTENTIAL ISSUES AT EACH STAGE	Perceived consequences of disclosure	Issues not defined Incomplete data Overlapping decision-making authority between jurisdictions	Density, design of project Impacts Mitigation features Costs/Benefits	Media confrontation Advocacy at public hearings political pressure	Threatened lawsuits Intensify political pressure	Lawsuit Appeal Political decision

constructive dialogue:

- Developer and agency planning staff can hold pre-application conferences to identify issues and leaders of affected community interests, to clarify the components and time frame of the required review process, and to explore the need for supplementary activities to ensure the quality of information and public discussion;
- Developer can meet with community leaders to present project concept and solicit feedback;
- Developer and planning officials can convene facilitated issue and opportunity identification sessions for interest group representatives or the general public; [15]
- Developer can identify interested parties and bargain directly with them over specific features of the project (e.g., scaled-down project in return for their support).

Step Two: *Submission of Application*
Staff Review for Completeness
Stage of Conflict: *Speculation*
Allegation

The developer, agency planers and community interest group have *not* engaged in preapplication consultation and problem issues have *not* been identified. The planning or zoning staff sends the application back to the developer because it lacks the data staff needs to make an environmental determination (i.e., whether or not to require an EIR).

Once a complete application is made, news of its submission reaches the public. Speculative assessments of the project's potential environmental and social impacts circulate in the community. Details of the plan are, as yet, unknown to the public.

An accepted application triggers the decision-making time clock. (Local governments in California, for example, are required to render decision on development proposals not more than one year—or up to 22 months with the applicant's concurrence—following the agency's acceptance of a completed application). Agency staff informs the Planning Commission (or Zoning Board) that, in staff's opinion, the proposed project would effect significant environmental impacts. Staff recommends that the developer be required to undertake an *environmental impact study*. The study would:

- *identify anticipated effects* of the project on the natural environment (air and water quality) and the socioeconomic environment (demands on public services, economic benefits, displacement of existing uses, etc.);
- *identify alternatives* to the proposed project—including *no project*—and their respective impacts;
- *suggest measures* to lessen and compensate for adverse impacts.

The agency and the developer now face the question: How to produce a useful and well-regarded (i.e., legitimate to the public)

EIR? Community groups, still not consulted, criticize the developer for failing to warn the public of his intentions. Allegations of collusion between the developer and public officials, e.g., secret meetings, are made by a few special interest advocates.

Alternative Approach:

After a project application has been received by the agency but before the EIR has been initiated, the local planning officials can acknowledge community concerns, identify issues, anticipate potential conflicts, and build public confidence in the proposed review process through brief, strategic "scoping" activities.[16]

- the local agency could sponsor facilitated EIR issue identification workshops for the memberships of various interest groups (e.g., neighborhood and business associations). The sessions could generate a list of issues and opportunities for the EIR to explore.
- the developer and the public agency could invite community leaders to work with them in preparing a Request for Proposals (RFP) that is sent to consultants who might compete for the EIR preparation contract. This working group might also select the EIR consultants.

Step Three: Preparation of Draft Environmental Impact Report (DEIR)

Stage of Conflict: Confrontation

Situation:

As part of their assignment, EIR consultants meet with various interest group representatives and residents to collect factual data and survey opinions about the project. The consultants identify conflicting positions regarding specific features of the proposal—e.g., height, density, design, traffic impact. The consultants' interaction with the public often precipitates the first skirmishes in the dispute. The consultants' impartiality in evaluating project impacts may be questioned by several opinion-makers.

As the public begins to express its concerns (e.g., appropriateness of use), and take sides, public officials decide to delay, hang back and wait for the public hearings to confirm what is already known: that a conflict of interests exists and those interests are preparing for open battle.

Will anyone take responsibility for initiating a dialogue between the disputing parties? Here are some *conventional* responses:

- Count on the EIR consultants to develop an alternative plan that will successfully address various community concerns;
- Count on agency staff to recommend amendments to the proposal that will be acceptable to the developer and the various community interests;
- Count on the public officials to formulate a compromise proposal;
- Count on the developer to make major modifications to his plan; and

- Count on the public to be patient and to trust that *someone* will *somehow* create a workable plan.

Alternative Approaches:

Instead of watching a cold war escalate between contending interests, agency officials might achieve better results by bringing the interested parties together in a collaborative effort[17] to identify and solve problems with the proposal:

- The developer, agency officials and representatives of affected parties could form a problem-solving committee. Specific activities could be to review EIR work-in-progress, trouble-shoot for outstanding problems, make public statements and sponsor community workshops on various issues;
- Community leaders could convene ad hoc bargaining sessions between the developer and interest group representatives.

In both approaches, solutions generated in the forums would be reflected in the Draft EIR. Employing these strategies, with the assistance of an experienced facilitator, could build positive working relationships among the parties, manage the flow of information to the major interest groups and may help resolve problems early on (minimizing later conflict). While requiring some commitment of public resources, these interventions save time and money in the long run because, the groundwork has been laid for a more predictable and less conflictual final decision.[18]

Step Four: Public Review of the Draft Environmental Impact Report (DEIR)

Stage of Conflict: Escalation

Situation:

The public hearing may be the first opportunity for interested members of the public to present their views face-to-face to the developer and public officials. Advocates for and against the project often overstate their positions, polarize the issues and alienate those with whom they have differences of opinion.

Confrontation tactics escalate during the public comment period. Parties to the dispute use the media and private pressure to convince public decision-makers to make a decision favorable to them. The dispute often moves beyond the issues to the egos of the contending advocates. Parties are unwilling to cooperate, compromise or even to listen to each other.

The agency officials responsible for managing the proposal consider their options at this juncture: 1) let political or legal considerations define the possibilities for resolution, or 2) assess the dimensions of the conflict, attempt a conciliation of the disputing parties and create a forum for dialogue between them.

Alternative Approaches:

- *Conflict assessment* is an analysis—usually by a neutral third party and sometimes by agency personnel—of the conflict's dimensions, with recommendations for conflict solutions. Its purpose is

to provide a new perspective on the dispute from which the parties themselves can design a workable outcome . . . Done very early, this step may itself prevent the conflict from developing further if the parties use the recommendations to work together productively. At later stages of the conflict, it can be used by an agency to decide whether to bring in an outside mediator.[19]

- *Conciliation* is a process to restore communications among disputing parties and foster a more cooperative attitude so that constructive discussions can resume . . . it usually occurs as part of a larger facilitation or mediation effort.[20]
- *DEIR Review Workshops*, open to the public and supported by several facilitators. The agenda of the workshops includes a presentation of the DEIR results and small group sessions to identify issues and opportunities that the draft report did not address.

Step Five: Publication of Final EIR
Staff Recommendations
Stage of Conflict: Impasse
Situation:

Pleasing some, but not all the disputing parties, the final EIR and staff recommendations are subjected to thorough scrutiny by the concerned community. The Planning Commission intends to use both reports as a basis for their decision to approve, approve conditionally, or turn down the project.

All parties to the dispute normally have intensified pressure on both the initial and apellate (City Council or County Board) decision making bodies. This pressure can include the threat of legal action against the agency.

The Executive Officer of the local government agency requests the Chief of The Planning Division to provide the Legal Department with a chronological account of the application review process so the agency can ascertain whether, in fact, it complied with all statutory requirement.

Parties to the dispute are polarized, awaiting the commission decision.

Alternative Approach:

- *Third party mediated negotiation* offers disputants a creative alternative to costly litigation or political expediency as a method for resolving conflict:

> *Mediation* is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the

parties themselves reach what they consider to be a workable solution.[21]

* * * *

In Another Part of Town . . .

The Chairperson of the Planning Commission sat at the bar of a downtown restaurant, sipping a 7-Up, waiting for four people to arrive: the developer, the open-space coalition representative, the housing coalition representative and the Vice Mayor. She had spoken to each of them on the phone, outlining the facts of the current impasse as she saw them: the Commission was severely divided on the issues; a decision either way might easily be overturned at the Council level, and therefore, the outcome was *entirely unpredictable.*

Further, she stated that a workable proposal was not an impossibility *if* each party was willing to listen, to be flexible, to be creative. Finally she floated a question to each representative. Was he willing to sit down with representatives of other contending interests to negotiate[22] an agreement?[23]

To her surprise, everyone agreed to give negotiation a try. All were skeptical, however, that after so much name-calling and hostility, an agreement could be reached or negotiations sustained. In response to their concerns, the Chairperson suggested that a professional mediator be engaged to:

- help establish the rules within which the negotiations would occur;
- handle logistics and secure a neutral meeting place;
- prepare agendas;
- facilitate negotiation sessions which includes recording group decisions, reminding participants of the rules, clarifying points, trouble-shooting for problems in proposals;
- shuttle between negotiating team caucuses, when necessary.

The Chairperson of the Planning Commission finished her drink and headed towards the door to greet the first arrival.

* * * *

Mediating Land-Use Disputes: It's Worth the Effort

It's worth the effort for public officials to consider using a trained mediator to help resolve land-use disputes where there are many parties involved, many issues and a high level of anxiety and uncertainty over the potential outcomes of the dispute. The kinds of dispute situations likely to benefit from mediation are:[24]

- Longstanding conflicts in which the frustration of the participants has reached an intolerable level, where the conflict *must* be resolved, and the participants recognize the need for a new approach;

- Conflicts that lack an established and/or adequate forum or system for resolution;
- Conflicts subject to strong external pressures toward resolution (e.g., a development project threatened with a lawsuit);
- Disputes that are already being negotiated by the parties themselves, i.e., disputes in which there is a demonstrated desire to work cooperatively toward settlement;
- Disputes not yet being negotiated in which there is some evidence that the parties want to talk to each other, or are talking to each other privately;
- Conflicts in which the disputants clearly have common goals, but are fighting over alternative means to achieve the goals.

Although mediators are usually requested when negotiations reach an impasse, earlier intervention in a dispute may increase the number of alternative solutions generated by the parties for settling their differences.

Impartial, third party participation in the land-use decision-making process can be helpful before mediation is actually required, for example: to scope out, or anticipate, potential sources of conflict before a proposal is formally submitted; to design or manage the proposal review process; to facilitate proposal review meetings; to assess the dimensions of conflict once it has escalated.

* * * *

Returning to the Story . . .

The negotiating group met thirteen times over the following two months. By agreement, the mediator's fee was paid in equal parts by the city, the developer, and the two citizen coalitions.

The first session focused on negotiation procedures, i.e., the rules and process for making agreements. The mediator recommended a step-by-step problem solving approach to resolving their difference.[25]

Without quite believing that productive sessions were possible under any process, the parties consented to the suggestion. They also agreed that their sessions would be closed to the public and that the Commission Chairperson would serve as official spokesperson. The vice-mayor and the housing coalition representative went out for a drink following the session and proceeded to have an argument.

Before the next meeting, the mediator solicited and received a promise from the developer to accept an extension of the city's decision making time limit in order to allow the negotiations enough time to produce results.

The content of the next few sessions focused on identifying problems with the development plan (as perceived by each party), and clarifying each party's underlying interests. The open space coalition representative, for instance, expressed dissatisfaction with the height and location of two proposed buildings within the project.

He was concerned that views of the forested hills within and surrounding the project site would be ruined by the buildings. That possibility was unacceptable to his coalition.

The group generated a list of forty problem issues and fifteen underlying concerns or interests. Some of the underlying concerns were: the rate of de-forestation of the city's outlying districts, pressure on the housing market, and vehicular congestion. The group used information in the DEIR to help generate the lists.

The mediator also asked the parties to list some of the positive aspects of the project. The exercise highlighted a previously buried fact: the opponents of the plan were not against the use of the site for commercial purposes; they were opposed to the project because of its potentially negative impacts.

Throughout each session, the mediator refocused the group's attention on the task at hand.

The agenda on the next series of sessions entailed generating agreement on which problems would be addressed by the group. The chairperson and the mediator jointly drafted a list of problems that appeared to capture the issues and concerns raised at the previous sessions. There were twenty proposed problems, including:

- How to preserve the forest lands adjacent to the development and along the entire perimeter of the city.
- How to maintain natural vistas within and around the development site.
- How to accommodate the expected demand for housing generated by the new facilities.

The negotiating group revised and narrowed down the proposed list to twelve problems. A few of the problems involved land-use policy for areas outside the project site. The Vice-Mayor noted that these problems might not have been seriously raised had the negotiations not been held.

Before the next series of meetings took place, the negotiating group broke down into sub-groups to investigate the scope of each problem. The Vice-Mayor and the housing coalition representative analyzed the housing demand problem. Referring to the draft EIR and the EIR consultants, they determined that the project would generate demand for 1000 additional units of housing. They also identified obstacles to providing new housing, e.g., limited amount of residentially-zoned land available for construction, and some of the repercussions for not addressing the problem (increased rental housing costs, displacement, etc.).

After hearing from the sub-groups, the negotiating parties met in joint session, in caucus with each other and individually to brainstorm alternatives for solving each problem. The mediator assisted the group by suggesting a list of criteria for evaluating alternative solutions (cost, political feasibility, compatibility with solutions to other problems, etc.).

In between group sessions, the mediator met with each representative individually to assist them in formulating their proposals.

At the next four sessions, the parties presented and discussed alternative solutions in light of the criteria they had agreed upon. Some solutions were simply agreed upon in the group sessions. Others were refined by the Chairperson and presented back to the group at a later session.

One by one, proposed solutions to particular problems were accepted by all the parties. An entire package of actions emerged at the end of the 13th session. The package included:

Modifications to the Proposal

- reduction of surface area devoted to parking
- relocation of two project buildings to alternative sites
- use of rustic landscape architecture, including building terrace plantings and preservation of several mature groves
- Jitney bus service to and from the downtown
- production of 140 units of moderately-priced cluster housing on the site
- reduction of retail uses by 20%
- payment of yearly fee, based on annual project revenues, into special fund to purchase specific forested lands for preservation

Recommendations to the Planning Commission and the City Council

- revision of general plan to limit development in certain forested areas along the city's perimeter
- amendment of PUD district regulations to include specific criteria to assess the compatibility of a proposed development with the surrounding environment
- issuance of a city bond to purchase specific forested sites

Satisfied with the final package, the developer amended his proposal. The interest group representatives promised their support of the modified project. The vice-mayor promised his best efforts to implement and pass the recommended public actions. The Chairperson announced the agreement to the press and placed the project on the Commission's calendar. The mediator received her last check in the mail and was asked by the Chair to remain available in case complications arose.

* * * *

Government officials are reluctant to supplement the land-use decision making process with collaborative problem solving and dispute management techniques because they often:

- *don't know about or understand* the alternatives available to them
- are concerned that using discretionary procedures (like mediation), not explicitly authorized by local or state law, *could risk legal action* against the agency

- *haven't received the go-ahead* to use these approaches from higher administrative or political authorities
- believe these alternative techniques will *undermine their authority*, take too much *time* or cost too much *money*
- don't have the *in-house experience* to know when to use these techniques or how to initiate them
- believe the *public will reject* the new approaches

Several environmental and community dispute services have either recommended or initiated the following strategies to remove some of these obstacles and to promote the use of alternative dispute management techniques:[26]

- Increasing the flow of information on alternative dispute management techniques—including successful case studies—to local officials and planning staffs;
- Convening conferences for government officials, developers and planners on the use of facilitated problem-solving, negotiation and mediation in making land-use decisions;
- Soliciting high level agency authorization—e.g., County Chief Executives, City Managers and Planning Department Directors—for initiating alternative approaches;
- Establishing training programs on facilitated problem-solving, mediation and designing participatory planning strategies in (a) local government planning departments and (b) graduate urban planning, public administration, and public policy schools;
- Introducing legislation at the state and local level to enable local governments to include an option for voluntary mediation in the land-use decision making process;[27]
- Establishing public or private sector land-use dispute management services, or supplementing existing community dispute services with a land-use component.[28]

Another obstacle to institutionalizing dispute management alternatives for land use conflicts is the lack of a stable source of financing. Funding for environmental and land-use mediation over the last decade has been provided principally by foundations. Established environmental mediation centers are now attempting to diversify their sources of financial support. Potential sources of financing for mediation and other third-party conflict and process management services are:

- State grants and contingency contracts to local dispute management centers;
- Special public-private sector funds to which government and industry would voluntarily contribute;
- Special Development Fees as a line item of the project budget (e.g., .5 to 1% of project costs) for potential dispute management services. The fee would be reimbursed to the developer if the services are not used;

- Local government financing through allocation of a portion of development permit fees for supplemental citizen participation and dispute management activities.

Conclusions

Government officials, agency land-use planners, and developers usually try to address public concerns regarding specific development proposals. To do so effectively, they need to pay closer attention to the *process* by which decisions are made, especially to how conflict that is generated during the course of the process is managed and resolved.

Although the requirements—time, organization, new skills, etc.—for managing dialogue between contending community interests are extensive, the systematic effort promises big benefits: an increase in public satisfaction with the decision making process, a reduction in unnecessary conflict in the later stages of decision making (including a reduction in litigation costs for all parties), and an increase in the number of land-use decisions which are based on community consensus.

Collaborative approaches to land-use planning and conflict management offer participants an opportunity to shift the context of their collective experience from a place of distrust and antagonism to one of cooperation and mutual gain.

* * * *

At the Planning Commission Meeting . . .

...the Chairperson looked around the near-vacant chambers and requested staff to read each motion:

> "That the Planning Commission advise the City Council to place on the ballot a proposal to issue special revenue bonds for the purpose of purchasing—for preservation—several forested lots in the outlying districts."
>
> "All in favor of the motion?" the Chair asked. Seven hands went up. "Unanimous. Thank you. Next please."
>
> "That the Planning Commission approve the Land Development, Inc. application as revised and recommended by the joint-negotiation group."

"All in favor of the motion?" Six hands went up. "All opposed?" One hand. "Motion approved, 6-1. Next."

> "That the Planning Commission initiate a general plan revision directed toward preserving all undeveloped forested lands on the perimeter of the city."

"All in favor?" The Chair counted three hands, including her own. "All opposed?" Four hands went up. "The motion is defeated, 4-3."

A groan emerged from the scattered audience.

One of the commissioners who voted against the motion raises his hand.

"Yes?"

"In light of the last vote, Ms. Chairperson, I'd like to move that the commission convene a problem-solving group to flesh out the concerns raised by this motion and return to us with some proposal we might all agree on."

The Chairperson looked at the gallery clock and smiled. It was only 9:45 P.M.

NOTES

1 For examples of the early uses of community consensus building, negotiation and mediation in environmental controversies, see: *Environmental Comment*, Urban Land Institute magazine, May 1977, also *Environmental Consensus*, *Resolve* Newsletter, 1978-1981 (Available from The Conservation Foundation, Washington, D.C.).

2 Mediation (facilitated negotiation) has, until recently, been commonly known as a process for resolving labor-management disputes. The use of "process managers" to facilitate negotiation and problem solving sessions is now used frequently in other sectors as an alternative to courtroom adjudication (e.g., divorce, landlord-tenant, small claims). In the public sector, experimental use of facilitated negotiation is underway in several communities to allocate public resources (Negotiated Investment Strategy, Kettering Foundation) and in the federal government to formulate regulatory standards and requirements (Negotiated Rule-Making). See *Environmental Impact Assessment Review*, March 1982, Plenum Press.

3 For examples of the use of alternative dispute management techniques in environmental controversies, see Talbot, Allan R., *Settling Things: Six Cases in Environmental Mediation*, The Conservation Foundation, 1983.

4 *Resolve,* The Conservation Foundation, Washington, D.C., Winter/Spring, 1983

5 Ibid., Summer, 1983

6 Op. Cit., *Resolve*, Winter/Spring, 1983

7 Consensus decisions are those consented to by all members of the group. These decisions do not imply that everyone is satisfied with the outcome, but that all agree to accept the decision.

8 *PUD ordinances* allow developers greater latitude in planning projects than rigid zoning classifications—e.g., ability to mix uses and densities on one site—in order to create more integrated and economically productive physical environments. *Contract or conditional zoning* enables local jurisdictions to exact contributions from a developer—public improvements, money, etc.—in return for latitude in design, set-back requirements, etc. *Development Agreements* provide developers with a guarantee that current zoning regulations governing the site will not be altered for a specified period in return for various public amenities. (Since local enabling legislation went into effect in California in 1980, over fifty local ordinances have been adopted by city and county governments). Each procedure requires some form of negotiation to occur

between public and private sector representatives. Public participation in these negotiations is often a controversial issue.

[9] Marcus, Phillip A., and Emrich, Wendy M. *Environmental Conflict Management Working Papers* American Arbitration Association, 1981, pp. iv-v.

[10] Wondolleck, Julia, McClennon, John A.S. *Managing Conflicts Over Economic Development in the Southwest Border Region*, American Arbitration Association, 1980, p.6.

[11] Cormick, Gerald, *Theory and Practice of Environmental Mediation,* Environmental Professional, Vol. 2, 1980, p. 27

[12] "Negotiation and Mediation," a pamphlet, the Kettering Foundation, Dayton, Ohio, 1982.

[13] The table, "Stages of Conflict in Local Land-use Decision-making" is adapted from *Conflict Stages of a Federal Environmental Decision,* Office of Surface Mining, Department of the Interior, appearing in Clark, Peter B., Emrich, Wendy M., *New Tools for Resolving Environmental Disputes*, American Arbitration Association, 1980.

[14] *Negotiated Development: An Alternative Urban Strategy/Executive Summary,* Forum for the Community and the Environment, 1980, p. 16.

[15] *Facilitation* is a process for managing meetings whereby a "facilitator" assists the group in clarifying and achieving its meeting objectives. The facilitator assists the group by helping to define and rank key issues, by encouraging individuals to communicate clearly, by making sure all opinions are heard, by suggesting methods for resolving problems; by protecting parties from attack, while not providing substantive opinion or advice.

[16] *Scoping* is a process for determining the range of issues to be analyzed in a federally required Environmental Impact Statement (EIS). It is mandated in the Council of Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) regulations, effective, July 1979. See Sachs, Andy, Clark, Peter, *Improving EIS Scoping: Federal Agency Experience and Techniques,* American Arbitration Association, 1983

[17] *Collaboration, or collaborative problem solving*, is a cooperative and voluntary process used by groups to solve problems of mutual concern including resolving differences between members. The groups work toward solutions that are acceptable to everyone. These solutions are called "win-win" because they meet the underlying interest—or essential objectives—of all the members. Models for using collaborative problem-solving as a decision-making method have been developed extensively by *Interaction Associates*, San Francisco, CA.

[18] Clark, Peter B., Emrich, Wendy M., *New Tools for Resolving Environmental Disputes*, American Arbitration Association, 1980, p. 12.

[19] Ibid., p. 4, and ROMCOE, "What ROMCOE Does" September 1978, Denver. ROMCOE is now known as Accord, still located in Denver.

[20] Ibid.

[21] Cormick, Gerald W., Patton, Leota K., *Environmental Mediation: Defining the Process Through Experience*, Office of Environmental Mediation, University of Washington, paper prepared for American Association for the Advancement of Science Symposium on Environmental Mediation Cases, Denver, Colorado, February 1977.

[22] "Negotiation is a means of striking a bargain where the parties meet face-to-face to settle issues in which there is a disagreement. There is a

mutual commitment by the parties to seek a mutually acceptable solution by which they will be bound." See Cormick, p. 25.

[23] For criteria regarding when to attempt negotiation in an environmental dispute, see Clark, Peter B., Cummings, Francis H., "Selecting an Environmental Conflict Strategy," *Environmental Conflict Management: Working Papers,* American Arbitration Association, 1981

[24] Carnduff, Susan B., Clark, Peter B., *Selected Reading on Conflict Management* American Arbitration Association, 1980, p. 12

[25] Doyle, Michael, Strauss, David, *How to Make Meetings Work,* Playboy Press, 1976; Doyle, Michael and Straus, David, *How to Design and Manage Collaborative Problem Solving Processes,* Interaction Associates, San Francisco, 1979

[26] The following organizations were contacted to survey their current and planned promotional strategies: Accord, Denver, CO; American Arbitration Association, Regional Office, San Francisco; Environmental Mediation Project, Wisconsin Center for Public Policy, Madison, WI; Center for Negotiation and Public Policy, Boston, MA; Connecticut Environmental Mediation Center, Hartford, CT; Conservation Foundation, Washington, D.C.; Environmental Mediation International, Washington, D.C; Forum for the Community and the Environment, Palo Alto, CA; Harvard Negotiation Project, Cambridge MA; Institute for Environmental Negotiation, Charlottesville, VA; Public Mediation Services, Falls Church, VA; Society for Professionals in Dispute Resolution, Washington, D.C.

[27] Proposed revisions to Pennsylvania's Municipalities Planning Code include a provision to enable local jurisdictions to use mediation as an option in resolving local development disputes. Though local governments can now opt for mediation without the legislation municipalities are unlikely to give it a try (as with such innovative techniques as transferred development rights) unless they are officially sanctioned in the enabling code. See "Environmental Currents," Fall, 1983, Brandywine Conservancy Environmental Management Center, Chadds Ford, PA.

[28] A state level environmental and land-use dispute settlement service is one approach for promoting alternative approaches. New Jersey's Department of the Public Advocate, a cabinet level agency, includes a dispute settlement component which provides mediation, conciliation and arbitration services for environmental, development, business and inter-governmental disputes.

*Reprints of the papers noted are available through: Institute for Environmental Negotiation, Campbell Hall, University of Virginia, Charlottesville, VA. 22903 (804) 924-1970